PERSPECTIVE MANAGEMENT SERVICES SDN BHD

v.

SEGANOM SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
KC VOHRAH JCA
FAIZA THAMBY CHIK J
[CIVIL APPEAL NO: W-02-753-95]
30 SEPTEMBER 2004

CIVIL PROCEDURE: *Action - Res judicata - Claim for ownership of shares - Separate claims for wrongful conversion and wrongful detention - Causes of action thereof - Whether indistinguishable - Whether barred by res judicata and issue estoppel - Whether an abuse of process*

The respondent had filed a suit against the appellant and three others for wrongful detention and alternatively for wrongful conversion of certain shares ('the first suit'), and another suit against the appellant alone for wrongful detention of the same shares ('the present suit'). Thereafter, a consent order was recorded in respect of the first suit, and following that the appellant applied to strike out the present suit on grounds of *res judicata*, estoppel and abuse of process. The learned judge took the view that the causes of action in the two suits were distinguishable, and so dismissed the appellant's application to strike out and allowed the respondent's preceding application to amend the statement of claim. The appellant appealed. The primary issue that arose was whether *res judicata* and estoppel applied to the present suit.

Held (allowing the appeal):
Per Mokhtar Sidin JCA delivering the majority judgment of the court

[1] The issues and the relief sought by the respondent were the same in both suits. The main claim of the respondent in the first suit was for wrongful detention, whilst wrongful conversion was only a claim in the alternative. However, assuming that the respondent was right in the contention that the claim in the first suit was for wrongful conversion whilst that of the present suit was for wrongful detention, those claims, except for the use of terminology, were similar in nature. The claims also arose from the same factual situation and *res judicata* and issue estoppel must therefore apply to the present suit.

[1a] In any case, the fault for not making a claim for wrong detention in the first suit must lie with the respondent. The facts in the two suits were exactly the same, and there was therefore no reason why the respondent must file another suit to claim for wrongful detention, and not incorporate it in the first suit. The respondent's failure to claim for wrongful detention in the first suit (if that be so) was fatal, considering the doctrine of *res judicata* or issue estoppel. The respondent, in filing the two suits, was also attempting to make two separate claims from the same cause of action and breach, and that, clearly, was an abuse of the process of the court.

[2] The consent order constituted a compromise between the parties. It followed that the claims and relief in the first suit which were not stated therein must be deemed to have been abandoned. This meant that, if a certain issue or claim or relief had been reserved for future litigation by the parties, as the respondent maintained, such reservation ought to be clearly shown in the order. There was no such reservation being spelt out in the order in respect of the claims against the appellant. *Res judicata* and issue estoppel, hence, must apply to the present suit.

[3] The writ and statement of claim ought to be struck off on grounds of *res judicata* and estoppel. For the same reason, the application by the respondent to amend the statement of claim ought to be dismissed.

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah memfail satu guaman terhadap perayu dan tiga yang lain kerana penahanan salah dan secara alternatifnya kerana penukaran salah saham-saham tertentu ('guaman pertama'), dan satu guaman lagi terhadap perayu sahaja kerana penahanan salah saham-saham yang sama ('guaman semasa'). Suatu perintah persetujuan kemudian telah direkodkan berhubung dengan guaman pertama, dan berikutnya perayu memohon untuk membatalkan guaman semasa atas alasan *res judicata*, estopel dan salahguna proses. Yang arif hakim mengambil pandangan bahawa kausa tindakan dalam kedua-dua guaman boleh dibezakan, dan dengan itu menolak permohonan perayu untuk pembatalan dan membenarkan permohonan terdahulu responden untuk meminda penyata tuntutannya. Perayu merayu dan isu penting yang berbangkit adalah sama ada guaman semasa di sini telah terjejas oleh *res judicata* dan estoppel.

Diputuskan (membenarkan rayuan):
Mokhtar Sidin HMR menyampaikan keputusan majoriti mahkamah

[1] Isu-isu dan relif yang dipohon oleh responden terhadap perayu dalam kedua-dua guaman adalah sama. Tuntutan utama responden dalam guaman pertama adalah untuk penahanan salah, sementara penukaran salah hanyalah satu tuntutan alternatif. Namun begitu, jikapun responden diandaikan betul dalam pengataannya bahawa tuntutan dalam guaman pertama adalah untuk penukaran salah sementara dalam guaman semasa pula untuk penahanan salah, tuntutan-tuntutan tersebut, kecuali dari segi penggunaan terminologi, adalah sama sifatnya. Tuntutan-tuntutan juga berbangkit dari situasi fakta yang serupa dan *res judicata* dan estopel adalah dengan itu terpakai kepada guaman semasa.

[1a] Walau apapun, kesalahan adalah atas responden kerana tidak membuat tuntutan untuk penahanan salah dalam guaman pertama. Fakta dalam kedua-dua guaman adalah sama, dan tidak ada sebab mengapa responden perlu memfail satu guaman lain bagi menuntut penahanan salah, dan tidak mencantumkannya sekali ke dalam guaman pertama. Kegagalan responden untuk menuntut penahanan salah dalam guaman pertama (sekiranya itulah kedudukannya) adalah memudaratkan, mengambilkira doktrin *res judicata* dan isu estopel. Selain itu, dalam memfailkan kedua-dua guaman, responden cuba membuat dua tuntutan berasingan dari kausa tindakan dan pelanggaran yang sama, dan itu, jelas, adalah suatu salah guna proses mahkamah.

[2] Perintah persetujuan adalah suatu kompromi di antara pihak-pihak. Oleh itu, apa jua relif dan tuntutan dalam guaman pertama yang tidak dirangkumi oleh perintah hendaklah dianggap sebagai telah digugurkan. Ini bererti, jika pihak-pihak ada menangguhkan mana-mana isu atau tuntutan atau relif untuk perbicaraan di masa-masa akan datang, sepertimana yang dikatakan responden, penangguhan sedemikian haruslah ditunjukkan dengan nyata oleh perintah. Tidak ada penangguhan mengenai tuntutan-tuntutan terhadap perayu dinyatakan di dalam perintah. Oleh itu, *res judicata* dan estopel haruslah terpakai kepada guaman semasa.

[3] Writ dan penyata tuntutan harus dibatalkan atas alasan *res judicata* dan estopel. Atas alasan yang sama permohonan responden untuk meminda penyata tuntutannya harus juga ditolak.

Cases(s) referred to:

The Indian Endurance Republic of India & Ors v. India Steamship Co Ltd [1993] 1 All ER 998 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

SCF Finance Co Ltd v. Masri & Anor (No 3) [1987] 1 All ER 194 ***(refd)***

Other sources(s) referred to:

David Foskett, *The Law and Practice of Compromise*, 4th edn, pp. 93 & 94

For the appellant - RR Sethu (Hazila Moharam); M/s CC Choo & Co
For the respondent - Manjit Singh; M/s Sri Ram & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D5-22-1175-93]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

The respondent filed two separate actions against the appellant in the High Court of Malaya at Kuala Lumpur. The first suit, No. D3-22-273-93 (hereinafter referred to as "the first suit") was dated 11 March 1993. In the first suit there were four defendants of which the appellant was named as the fourth defendant. According to the writ and the statement of claim in the first suit the first defendant was MBf Securities Sdn Bhd; the second defendant was an individual by the name of Aliah bt. Mohd Yasin and the third defendant was also an individual by the name of Ang Cheng Kim. Apparently, the second and third defendants not only counterclaimed against the respondent but also filed separate actions in the High Court of Malaya at Muar. The appellant was not involved in the counterclaims and the suits in the Muar High Court. The second suit filed by the respondent against the appellant is Civil Suit No. D5-22-1175-93 (hereinafter referred to as "the present suit") dated 18 October 1993. The appellant is the only defendant in the present suit which is the present appeal.

It is not disputed that as against the appellant the subject matter in both suits are the same. The difference is the relief claimed by the respondent. It is also not disputed that in both suits the appellant has been sued as the Registrar of Aokam Perdana Berhad, a public listed company. The respondent in both suits claimed that they were the registered owner of 900,000 of Aokam Perdana Berhad (APB) shares (hereinafter referred to as "those shares"). Sometime on 4 August 1992, the respondent sent over the scripts for those shares to the appellant with instruction to split those shares into 1,000 shares per lot in the name of their nominee. By a letter dated 5 August 1992, MBf Securities Bhd informed the appellant that they were the beneficial owner of the 900,000 shares

and those shares had been lost and a police report had been lodged. Subsequently, the police seized those shares from the appellant. By letters dated 5 August 1992 and 6 August 1992, the respondent requested for the return of those shares but the appellant was unable to do so because the shares had been seized by the police. It was not disputed that the appellant informed the respondent of this. Eventually, the respondent was informed that the police had returned those shares to the appellant but the appellant was unable to split and register those shares in the name of the respondent's nominee because of the dispute in respect of the ownership of those shares between the respondent and the other three defendants in the first suit. The ownership of those shares was finally determined by way of a consent order dated 2 November 1993. This consent order was in respect of the first suit of which the appellant was also a party. In the consent order it was also ordered that the other suits in the Muar High Court were to be discontinued. It is not disputed that the present suit was not stated in the consent order.

By a summons-in-chambers dated 24 December 1993 the respondent filed an application to amend the writ and the statement of claim. The appellant, on the other hand, applied to strike out the present suit through its application by way of summons-in-chambers dated 29 January 1994. On 14 June 1994 the deputy registrar heard the summons-in-chambers dated 24 December 1993 and allowed the application by the respondent to amend the writ and statement of claim in respect of the present suit. The appellant then appealed against that decision to the Judge in chambers. The learned Judge heard the appeal on 8 November 1995 and dismissed the appeal. Being dissatisfied with that decision the appellant appealed to this court. Apparently, from the submissions by both parties and the judgment of the learned judge, the appellant in opposing the application by the respondent to amend the writ and the statement of claim also raised the issues in their application to strike out the writ and the statement of claim in the present suit.

Before us, Dato' RR Sethu, the learned counsel for the appellant, submitted that the amendments proposed are not ordinary amendments. The learned counsel contended that an amendment is only permitted if, at the date of the application for the amendment, the action is maintainable in law. If it is not maintainable then the amendment ought not to be granted. He went on to state that the respondent filed two separate actions against the appellant *vide* Civil Suit No. D3-22-273-93 (the first suit) and Civil Suit No. D5-22-1175-93 (the present suit). In order to appreciate the objection by the appellant to the amendments, one has to examine the subject matter of the claim and the causes of actions in both suits.

The claim by the respondent against the appellant in the first suit was for wrongful conversion and wrongful detention. In the present suit the respondent claimed that the shares were in the possession of the appellant and that the appellant failed to return those shares immediately when the respondent demanded for the return and sought relief for the immediate return of those shares and damages for "wrongful detention of the shares". The first suit came up before VC George J (as he then was) while the present suit was before Abdul Malek Ahmad J (as he then was). When the present suit came before Abdul Malek Ahmad J on 27 October 1993, he made a ruling that the ownership of the shares, which was the main issue in the first suit, be heard first. The parties in the first suit came to a compromise whereupon a consent order was entered on 2 November 1993. Under that order the appellant was ordered to split those shares and deliver the split shares to the respondent within 48 hours. There was no order in respect of damages against the appellant even though one of the relief prayed for was damages for wrongful conversion and wrongful detention. It is not disputed that the appellant had complied with the consent order. The significant point to note in that order is that the other suits in the Muar High Court were to be discontinued. However, there is no mention of the present suit in that order.

The learned counsel for the appellant contended that the omission of the present suit in the consent order is irrelevant. In reality the present suit is the same as the first suit, as such the continuance of the present suit after the first suit had been settled is an abuse of the process of the court because the issues raised by the respondent in the present suit had been resolved by the compromise in the first suit. The issues could not be relitigated and that the respondent is barred by the doctrine of *res judicata* and issue estoppel from doing so. The appellant has been identified in both suits as the share registrar and it is not disputed that the appellant never claimed to be the owner of those shares. The appellant's counsel submitted that in the first suit the respondent sought a declaration that the respondent were the owner of those shares and against the appellant, the respondent claimed for damages for wrongful detention. The consent order had compromised those claims. As a result of that compromise all the claims in the first suit were deemed to have been abandoned. The appellant's counsel further submitted that the consent order brought an end to all matters in dispute between the respondent and the appellant whereupon the respondent's cause of action against the appellant for all relief and remedies (including damages) merged in the said consent order. That being the case, the issues in the present suit have been concluded. In view of that, the present suit is an abuse of the court's process and is not maintainable. That being the case the amendments ought not to be allowed because the alleged cause of action has been extinguished by the consent order.

The learned counsel for the respondent, on the other hand, submitted that the cause of action in the first suit was different from the cause of action in the present suit. The first suit related to the dispute over the beneficial ownership of the shares while the present suit is in regard to the wrongful detention of the shares by the appellant. The consent order that was entered after the present action was filed stipulated expressly the suits covered by the consent order were the first suit and Civil Suit No. 22-12-90 in the Muar High Court. The present suit was deliberately omitted, as the cause of action in the present suit still prevails. As such the doctrine of res judicata and the issue estoppel are not applicable to the present suit.

The learned counsel for the respondent further submitted that the learned judge of the High Court was correct in finding that the cause of action in the first suit was different from the cause of action in the present suit as stated in his judgment:

> The compromise reached in the other suit was as regards the delivery of the shares in the possession of the first defendant here to the plaintiff subject to payment being made by the plaintiff to the other defendants there and as regards the return of the shares in the first defendant there by the plaintiff to the solicitors of the second defendant there subject to the payment by the second defendant there at the agreed price whereas the amendments sought to be made in this action relate to the damages for the said retention of the shares by the defendants here. It cannot be said that the settlement in the other suit, where the parties and their capacities are not exactly the same, would prevent the plaintiff here from getting damages from the defendants here.

In *Henderson v. Henderson* [1843] 3 Hare 100, it was said:

> … Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.

In *Greenhalgh v. Mallard* [1947] 2 All ER 255, it was stated:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

From these decisions, it would appear that the other suit and this action are interrelated and a compromise in one would have automatically meant the end of the other. However, to my mind, the issue of damages had not been left out in the other suit on purpose or through negligence as the other suit was only to determine the beneficial ownership of the shares. After that was settled, it was up to the plaintiff whether or not to claim for damages if necessary. The fact that this action was not included in the consent order of the other suit, when both parties knew that it was pending, shows that the parties were aware then that this matter was still being proceeded with. By not insisting that this action be included in the compromise in the other suit is a strong indication that the first defendant held the view that the matters could be dealt with separately. The issue of res judicata, therefore, cannot apply.

The appellant's counsel, on the other hand, submitted that the learned judge was in error in his judgment because the claim against the appellant in the first suit was not to determine the beneficial ownership of those shares but for alleged wrongful detention of those shares and this is the claim against the appellant in the present suit. As can be seen from the statement of claim in both the suits the facts leading to the wrongful detention on the part of the appellant are identical. In the first suit the claim against the appellant is stated as follows:

> 5. The 4th Defendant is a company incorporated in Malaysia with a registered office at No. 67-2, Jalan Bangkung, Bukit Bandaraya, 59100 Kuala and is the Registrar of Aokam.
>
> ...
>
> 9. On or about 4.8.92, the Plaintiff caused the said APB shares to be delivered to the 4th Defendant with instructions to split the said APB shares into marketable lots of shares comprising of 1,000 shares per lot.
>
> 10. By a letter dated 5.8.92, the 1st Defendant wrongfully informed the 4th Defendant that they were the beneficial owners of the said APB shares. By the said letter, the 1st Defendant also put the 4th Defendant on notice that a police report had been lodged that the APB shares have been lost and the matter is under investigation. The said letter further wrongfully directed the 4th Defendant to withhold the shares and not release them to the Plaintiff.

11. By letters dated 5.8.92 and 6.8.92, the Plaintiff's solicitors requested the 4th Defendant to return the APB share certificates to the Plaintiff's solicitors. The 4th Defendant did not comply with both the said requests.

12. By a letter dated 6.8.92, the Plaintiff's solicitors were informed by the 4th Defendant that the 1st Defendant had, on 8.10.90, reported the loss of the APB shares and had requested the 4th Defendant to withhold the shares. The 4th Defendant also informed the Plaintiff in the said letter that they will therefore be unable to proceed with the registration of the APB shares in favour of one Vijaya Kumar s/o T. Chornalingam who was acting as a nominee for the Plaintiff at the material time.

13. Pursuant to the purported exercise of a power under section 51(i) of the Criminal Procedure Code, the APB shares were seized by the Police in connection with the report made by the 1st Defendant and/or 2nd Defendant and/or 3rd Defendant, on 6.8.92. The Plaintiff's solicitors were informed of the said seizure by a letter dated 6.8.92 from the 4th Defendant.

14. At all material times, the 1st, 2nd, 3rd and 4th Defendants had no interest of a legal or beneficial nature in respect of the said shares.

15. In particular, the 1st, 2nd, 3rd and 4th Defendants knew or ought to have known that by their actions described in the aforesaid paragraphs, the said APB shares would be seized by the police. The said 1st, 2nd, 3rd and 4th Defendants were under a duty to the Plaintiff not to act in a manner which would cause the APB shares to be seized unlawfully and/or wrongfully. The 1st, 2nd, 3rd and 4th Defendants in breach of their legal duty caused the said shares to be seized unlawfully and/or wrongfully.

PARTICULARS

(a) At all material times, the 1st and/or 2nd and/or 3rd Defendants had knowledge or means of knowledge that the APB shares were duly released by Visia to the Plaintiff on the instructions of the 1st Defendant and/or 2nd Defendant.

(b) At all material times, the 1st and/or 2nd Defendants wrongfully lodged a Police Report which led to the seizure of the APB shares from the 4th Defendant.

(c) The 1st, 2nd and/or 3rd Defendants wrongfully held themselves out to be the beneficial owners of the APB shares thereby preventing the APB shares from being duly split and registered by the 4th Defendant in favour of the Plaintiff's nominee.

(d) Further, at all material times, the 1st, 2nd and/or 3rd Defendants knew or ought to have known that in lodging the said Police Report and in representing themselves to the 4th Defendant as beneficial owners, the Plaintiff would be unable to proceed with the splitting and the sale of the APB shares.

(e) The 4th Defendant wrongfully failed to duly split and register the APB shares forwarded to them by the Plaintiff.

(f) The 4th Defendant wrongfully failed to register the APB shares as instructed by the Plaintiff's solicitors when they knew or ought to have known that the Kuala Lumpur Stock Exchange had ruled that they were obliged only to refuse to register such shares in the name of any party requesting such transfer and registration for a period of one (1) month from the date of the said ruling. Further, the 4th Defendant was well aware that the 1st, 2nd and 3rd Defendants had taken no further steps in law to protect their alleged beneficial interest in the APB shares.

In consequence of the aforesaid breaches by the Defendants, the Plaintiff suffered loss, damage and expense.

16. Further and/or in the alternative, the 4th Defendant has converted the APB shares for its own use and thereby the Plaintiff has also suffered loss, damage and expense.

17. By reason of the conversion, the Plaintiff have suffered loss and damage.

PARTICULARS OF LOSS

(a) the value of 900,000 Aokam shares as determined at the trial of this case.

…

The original claims (before the amendments) of the respondent in the present suit where the appellant is the only defendant are as follows:

1. The Plaintiff is a Company incorporated in Malaysia with a registered address at Lot 4.78, 4th Floor, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur.

2. The Plaintiff is and was at all material times the registered owner of 900,000 shares in Aokam Tin Bhd (now known as Aokam Perdana Bhd) ("Aokam") comprised in Share Certificates Nos. A27476, A27477, A27478, A27479, A27480, A27481, A27482, A27483 and A27484 ("the said Shares").

3. The Defendant is a company incorporated in Malaysia with a registered office at Nos 20 & 21-1, Jalan Telawi 3, Bangsar Baru, 59100 Kuala Lumpur and is the Registrar of Aokam.

4. The Defendant is in possession of the said Shares at the date of the Writ herein.

5. The Plaintiff as registered owner of the said Shares has the right and is entitled to immediate possession of the said Shares.

6. Despite repeated demands by the Plaintiff, the Defendant has failed and/or refused to deliver up the said Shares to the Plaintiff.

WHEREFORE the Plaintiff claims against the Defendant:

(1) a declaration that the Plaintiff is entitled to the immediate possession of the said Shares;

(2) a mandatory injunction directed to the Defendant requiring the Defendant to forthwith deliver up the said Shares to the Plaintiff;

(3) damages for wrongful detention of the said Shares;

(4) costs;

(5) further or other relief.

Comparing the claims against the appellant only in the two suits, it is not disputed that the shares stated in both suits are in respect of the same shares. It is also not disputed that those shares were handed over to the appellant by the respondent with the request that those shares be split up into marketable lots of 1,000 shares per lot. Though this was not stated in the present suit, the respondent did not dispute this fact. It is also not disputed that the appellant is the Registrar of Aokam. Further, it is not disputed that the appellant was not able to split those shares because of the dispute of ownership as seen in the first suit and that those shares were seized by the police. This is also not stated in the present suit. It is also not disputed that the respondent demanded the return of those shares in the first suit and a second demand after the police returned those shares to the appellant. It is also not disputed that the appellant did not return those shares to the respondent at the time when the two suits were filed. Because of the failure on the part of the appellant to return those shares, the claim of the respondent against the appellant in the first suit as stated in para. 16 of the statement of claim was wrongful conversion of those shares by the appellant for its own use. Close reading of paras. 10, 11, 12, 14 and 15 of the statement of claim in the first suit show that the respondent

also claimed for wrongful detention of those shares by the appellant. The claim for wrongful conversion in the first suit was an alternative claim. The appellant was not involved in the dispute of ownership of those shares in the first suit.

Looking at the consent order, the dispute of the beneficial ownership between the respondent and the other defendants in the first suit was genuine. Under the consent order the appellant was only asked to deliver the split-up shares to the respondent.

It is necessary for us to stress on this because we have to view and identify the actual claims against the appellant in the first suit and then compare those claims with the claims in the present suit. It is clear to us that the claim by the respondent against the appellant in the first suit was for damages for wrongful detention of those shares or in the alternative for wrongful conversion only and no other claim.

In the present suit the claim (before the amendments) of the respondent against the appellant is for wrongful detention of those shares. Comparing the claims in the two suits, we find that the claim in the present suit is the same as the main claim against the appellant in the first suit, ie, for wrongful detention of those shares. The claim for wrongful conversion was a claim in the alternative in the first suit.

The learned judge appeared to concede that the cause of action in both suits are the same when he said:

> From the decisions, it would appear that the other suit and this action are interrelated and a compromise in one would have automatically meant the end of the other. However, to my mind, the issue of damages had not been left out in the other suit on purpose or through negligence as the other suit was only to determine the beneficial ownership of the shares.

From the above, the learned judge was of the view that the issue of damages have been left out on purpose because the first suit only determined the beneficial ownership of the shares. The appellant disputed this.

Perusing the statement of claim in the present suit, the respondent seek a declaration that they are entitled to immediate possession of those shares and the immediate delivery of those shares to them. The respondent made the same claim against the appellant in the first suit. As we have stated above, the respondent's claim for damages in the present suit is for wrongful detention which was the main claim in the first suit.

The respondent's counsel attempted to draw a distinction between the claim in the first suit and the claim in the present suit. It was his contention that the claim in the first suit was for wrongful conversion of those shares while in the present suit the claim is for wrongful detention of those shares. As pointed out above, perusing the statement of claim of the first suit, we find that the main claim of the respondent against the appellant was for wrongful detention. Wrongful conversion was only a claim in the alternative. Even assuming the respondent's counsel was correct, we agree with the appellant's counsel that the claim for wrongful detention and wrongful conversion are similar except the usage of terminology. In our view, a wrongful conversion can only take place after a wrongful detention. Further, the claim arose from the same factual situation and for those reasons, we find that there is no difference between wrongful detention and wrongful conversion and as such the doctrine of res judicata applies to the present suit. We also agree with the appellant's counsel that even though the consent order did not state the present suit as one of the suits to be discontinued, the respondent cannot proceed with the present suit because of the doctrine of res judicata and issue estoppel.

The doctrine of res judicata is explained in *The Indian Endurance Republic of India & Ors v. India Steamship Co Ltd* [1993] 1 All ER 998. In that case, the appellants, the Republic of India and the Ministry of Defence, were the owners of a cargo of munitions carried out on board the respondents' vessel in September 1987 pursuant to bills of lading for a voyage from Sweden to India. The munitions, which included a small number of artillery shells, were loaded in no. 3 hold above wood pulp destined for other consignees. In the course of the voyage a fire was discovered in the hold and it was extinguished with water. The vessel diverted to Cherbourg for a survey and the cargo was repacked and restowed. Fifty-one artillery shells were jettisoned as damaged and compression damage to some of the boxes of munitions, caused by the swelling of the wood pulp in the hold after it had been flooded with water, was noted. The vessel then continued its voyage to India, where the cargo was unloaded from the vessel. Following correspondence between the Ministry of Defence and the respondents about the damage to the cargo, the ministry made a claim against the respondents for the total loss of their cargo. In early August 1988, agreement was reached to extend time for commencement of proceedings for a year. On 1 September 1988 the Union of India as plaintiff brought proceedings in India against the respondents claiming damages for the 51 shells which had not been delivered, alleging negligence while the cargo was in transit. Judgment was given against the respondents in December 1989. However, before judgment was given the appellants issued out of the Admiralty Court in England a writ in rem against the respondents claiming total loss of the munitions, including

the 51 shells which had been the subject of the Indian action, and alleging (i) breach of contract and/or duty as a carrier by sea for reward to deliver the goods in like good order and condition as when shipped, (ii) negligence and breach of duty as carriers and/or bailees for reward, and (iii) breach of their obligations under the Hague Visby Rules (as set out in the schedule to the Carriage of Goods by Sea Act 1971). The respondents by their defence asserted that the claim was barred by res judicata and relied on s. 34 of the Civil Jurisdiction and Judgments Act 1982. The judge upheld the contention and struck out the claim. On appeal by the appellants the Court of Appeal affirmed the decision. The appellants appealed to the House of Lords, contending, inter alia, that there was no identity between the subject matters of the two sets of proceedings and, in any event, there was an arguable case that the respondents had waived or were estopped from relying on their right to invoke s. 34 of the 1982 Act and that, therefore, the case should be remitted to the Admiralty Court to determine that issue on the evidence. Lord Goff of Chieveley delivering the judgment of the House stated at pp. 1005-1007:

> It will be observed that, among the allegations pleaded against the shipowners is a failure to deliver the goods in like good order and condition as when shipped. This reflects the fact that such a failure is *prima facie* evidence of breach of contract, and probably also of negligence (ie breach of duty as bailee), with the effect that the onus then passes to the shipowner to exonerate himself from liability, which is normally done by invoking one of the excepted perils. However in a case like the present, in which the Hague Visby Rules apply, it is inevitable that attention will be focused upon the applicable obligations and exceptions in arts III and IV of the rules, and that the dispute will be decided on the basis of those provisions.
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> I turn to the proceedings in India. As appears from the plaint in the Cochin action, the claim was in respect of deficiencies in (or, as we usually call it, short delivery of) the charge delivered at Cochin, *viz* 51 shells (and a small item described as 'charge green bag'). According to the agreed statement of facts before your Lordships, the 51 shells had been jettisoned at Cherbourg. The claim was advanced under one of the two bills of lading under which the consignment was shipped. Your Lordships were, however, informed that no point was taken on this, presumably because some of the 51 shells had in fact been shipped under each of the two bills of lading (see the particulars of loss under para 10 of the amended statement of claim in the present proceedings ([1992] 1 Lloyd's Rep 124 at 128). In the plaint, it was alleged that the shipowners had been guilty of negligence while the cargo was in transit in the vessel, which presumably refers to a breach of their duty as bailees (carriers for reward). However, in the judgment, the learned judge stated that it was 'more or less not in dispute' that the law applicable to the carriage of the goods was the Indian Carriage of Goods by Sea Act 1925.

That must have incorporated the old Hague Rules into the bill of lading contract; they are not for present purposes different from the Hague Visby Rules. Further, the judge made an express finding that the ship was seaworthy and cargoworthy. He then considered whether the shipowners were entitled to be relieved from liability (presumably under art III(2) by virtue of art IV(2)(a) or (b) of the Hague Visby Rules, and decided that they were unable to do so on the facts of the case. Accordingly, he held the shipowners liable for the value of the undelivered cargo.

The argument advanced by the appellants before your Lordships was that, for the purposes of ascertaining whether there was identity between the causes of action in the two sets of proceedings, a distinction had to be drawn between an action for damage to cargo (as in the present proceeding) and an action for short delivery (as in the Cochin proceedings). The submission was that, in accordance with the principle stated by *Diplock LJ in Letang v. Cooper* [1964] 2 All ER 929 at 935, [1965] 1 QB 232 at 243 a cause of action consists of the minimum facts which a plaintiff is required in law to plead and (if traversed) prove in order to obtain the relief which he claims. The minimum facts which, it was submitted, have to be proved in a damage to cargo claim are (1) the condition of goods on shipment and (2) their damaged condition on delivery; whereas in a short delivery claim they are (1) the quantity of the goods shipped and (2) the lesser quantity delivered. It follows, ran the submission, that there was no identity between the causes of action in the two sets of proceedings. Furthermore, the appellants submitted, the Court of Appeal had in truth confused the principle of *res judicata*, under which the same cause of action, cannot be litigated twice, with the wider principle in *Henderson v. Henderson* [1843] 3 Hare 100, [1843-60] All ER Rep 378, under which a point which could and should have been but was not raised in certain proceedings is barred in subsequent proceedings in which the same issue arises. On this basis, the appellants were able to argue, first, that s.34 of the 1982 Act did not apply, and second, that on the principle in *Henderson v Henderson*, which does not apply in certain special circumstances, arguments were open to them which required investigation and which rendered it inappropriate to strike out their statement of claim in the present case.

Now the difficulty with this argument is that it ignores the fact that the goods in question were shipped under a contract of carriage the terms of which (as set out in the Hague Rules or the Hague Visby Rules) regulate the respective rights and obligations of the parties. In these circumstances, the mere fact that the pleader can, so to speak, get the case on its feet by alleging short delivery or delivery of the goods not in the like good order and condition as when shipped, does not in my opinion assist. For it is wholly unrealistic to regard the cause of action as being other than a cause of action arising under the contract, which provides for the relevant duties of the shipowners regarding the seaworthiness of the ship and the care of the goods. Even if attention is

concentrated on the liability of the shipowner as bailee, the fact remains that he is a bailee for reward, and that accordingly his liability will be governed by the terms of the contract of carriage.

In these circumstances, the case is very different from a simple action in negligence, as for example a running down action, where damage is of the essence of the claim in the sense that damage must be proved to establish the cause of action. In such a case, it is theoretically possible to segregate different causes of action by reference to different heads of damage. Thus in *Brunsden v. Humphrey* [1884] 14 QBD 141, [1881-5] All ER Rep 357, a case concerned with res judicata, a distinction was drawn between damage to the plaintiff's carriage and damage to his person arising out of the same incident, and it was held that an earlier action by the plaintiff for the former constituted no bar to a subsequent action for the latter. The decision has not been without its critics, who prefer the dissenting judgment of Lord Coleridge CJ; but so narrow an approach is not in any event possible in a contractual context, where proof of damage is not necessary to establish the cause of action. Here, as is shown by *Conquer v. Boot* [1928] 2 KB 336, [1928] All ER Rep 120, it is necessary to identify the relevant breach of contract; and if it transpires that the cause of action in the first action is a breach of contract which is the same breach of contract which constitutes the cause of action in the second, then the principle of res judicata applies, and the plaintiff cannot escape from the conclusion by pleading in the second action particulars of damage which were not pleaded in the first. In *Conquer v. Boot* the relevant breach of contract was identified as being breach of a promise to complete a bungalow which the defendant was building for the plaintiff. Talbot J said ([1928] 2 KB 336 at 344-345, [1928] All ER Rep 120 at 124):

> Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From that moment the Statute of Limitations began to run as to the whole. The plaintiff could not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same ... .

Talbot J expressed his conclusion as follows ([1928] 2 KB 336 at 346, [1928] All ER Rep 120 at 125):

> I think therefore that the plea of res judicata or judgment recovered is an answer to the whole of this action, and that the defendant is entitled to judgment.

> If I turn to the present case, I find that the situation is not precisely the same. The present case is not concerned with the failure to construct a building in accordance with a certain specification, which can result in a whole series of defects which may nevertheless lead to a single breach of contract, ie the failure to hand over the building constructed in accordance with the terms of the contract. It is rather concerned with a single incident, ie the fire during transit which broke out in the cargo over which the appellants' consignment of munitions was stowed, which resulted in the damage to that consignment and to loss (by jettison) of a small part of it. Furthermore, as appears from the pleadings, that loss or damage might have resulted from breach of more than one term of the contract, for example breach of the obligation to make the vessel seaworthy under art III(1) of the Hague Visby Rules, or breach of the obligation to load and stow etc the vessel carefully under art III(2). However, for present purposes, there is no need to distinguish between the two breaches, because the factual basis relied upon by the appellants as giving rise to the two breaches in the same, and indeed was referred to compendiously by the appellants in the Cochin action as 'negligence'. In these circumstances, I am satisfied that there is identity between the causes of action in the two sets of proceedings.

The House of Lords found the causes of action in the two proceedings were put in two different versions were in respect of the same breach. The House of Lords however, did not strike out the proceeding in the English court on the ground that on its true construction s. 34 of the 1982 Act provided no more than a bar against proceedings by a plaintiff and did not exclude the jurisdiction of the court, its function being to give effect to the policy underlying the principle of res judicata in the circumstances specified therein. It was therefore open to the appellants to raise the plea of waiver or estoppel. In the circumstances the plea of waiver or estoppel should not be rejected summarily, whether the respondents were estopped from raising the plea of *res judicata* was a matter to be decided on the evidence. On this ground alone the House of Lords allowed the appeal.

In Malaysia the doctrine of res judicata is explained by Peh Swee Chin, FCJ (as he then was) in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783. At pp. 791-795 his Lordship explained:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that

there should be finality in litigation – interest *rei publicae ut sit finis litium.* It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 at p 115 which is:

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

It may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein below belongs. Please see the finer points of law in regard to default judgments from the position of the doctrine of res judicata in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants.

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg please see s. 40 of the Evidence Act 1950, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection with the famous passage of Wigram VC which Lord Shaw in *Hoystead v. Taxation Commissioner* [1962] AC 155 at p 170 spoke of as 'settled law' in the Privy Council.

Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development of the first type.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is *res judicata*.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. ...

...

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.'

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, ie doctrine of estoppel *per rem judicatum.*

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement, ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co v Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690.

In *Yat Tung*'s case itself, the bank sold some property to Yat Tung which mortgaged the same property back to the bank. Yat Tung defaulted on payment of interest on the mortgage and the bank exercising its right of sale, sold the same property to the second respondent. After such sale to the second respondent, in 1969, Yat Tung sued the bank on the ground that the bank's sale of the property to Yat Tung in the first place was a sham and therefore a nullity and the bank counterclaimed for loss on resale to the second respondent, denying the alleged nullity. Yat Tung failed in this first action and the bank succeeded. After the judgment, Yat Tung in 1972 once more in a second action on the ground that the subsequent sale by the bank to the second respondent of the same property was fraudulent, etc on the ground of some collusion between the bank and the second respondent. It will be remembered that the sale to the second respondent took place before Yat Tung filed the earlier action. On appeal, and even further appeal to the Judicial Committee, the order was confirmed on the ground that the doctrine of res judicata applied.

Thus, in *SCF Finance Co Ltd v. Masri & Anor (No. 3)* [1987] QB 1028; [1987] 1 All ER 194, the English Court of Appeal held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had

pleaded that issue but elected not to proceed on the issue in the previous proceeding. It was held she was not entitled to assert that issue afresh in subsequent proceedings, even if that issue was not heard and determined and it was even 'reserved'.

...

A word of caution is required about the words 'exercising reasonable diligence' in the said famous passage [in *Henderson v. Henderson* [1843] 3 Hare 100]. The words do not, in our view, necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial, the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the earlier action and which were not.

The words ought to be understood as a gentle rebuke for the failure aforesaid, ie despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and the words are not meant to impose a pre-condition for applying the doctrine of *res judicata* but are meant to say that the said non-bringing of the issues would count in any event irrespective of whether the said failure was or was not deliberate or due to inadvertence or negligence. Otherwise, the words would have virtually all but destroyed the efficacy of estoppel *per rem juticatum.*

Another source of small confusion is the rule that generally an estoppel, of which an estoppel per rem judicatum is a kind, as the name implies, has to be pleaded. But in Superintendent of *Pudu Prison v. Sim Kie Chong* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ held to the effect that the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicate against a party even it has not been pleaded. We venture to think the reason for the ratio is that an estoppel or exclusion of evidence based on a question of public policy, ie in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded.

We think we have dealt with certain parts of the doctrine of *res judicata* sufficiently for the purpose of determining the instant appeal. We now revert to the factors in the instant appeal.

Looking at the wording of both the earlier originating motion aforesaid and the statement of claim in the action concerned therein, and looking also at the content of the supporting affidavit of the earlier originating motion, the causes of action of both proceedings are identical. Both claim damages for failure or refusal of the identical finance company to allow the same borrower to utilize in full the identical loan of RM750,000, causing loss consequent

upon the failure of the identical housing scheme or housing development to be proceeded further. The action in the court below and immediately concerned herein claims only one relief or one relief in substance, damages for refusal to allow the borrower to borrow the full sum of RM750,000.

Again all rights and liabilities of both parties had merged into the judgment delivered on the said originating motion and the judgment was confirmed by the Supreme Court and it is therefore final. The cause of action estoppel applies unquestionably against the borrower and the borrower's case represents a classical case for the application of the doctrine of res judicata by way of a cause of action estoppel; the cause of action being the action for damages for refusal of the finance company to allow the borrower to utilize or borrow completely the total sum of the agreed loan. The effect of a cause of action estoppel is so absolute that it is really unnecessary to delve further into the issues of law or of fact. What we just said however is subject to what is to be said further below.

As stated above, we have found the issues and relief sought by the respondent against the appellant in the present case are the same in both suits. In our view, when the respondent entered into a consent order with the defendants (including the appellant in the present suit), the parties came to a compromise whereby amongst others the respondent was declared to be the beneficial owner of those shares and the appellant was given 48 hours to split up those shares and deliver the scripts to the respondent. Further, we are of the view that since the consent order was a compromise, those claims and relief in the first suit not stated in that order, are deemed to have been abandoned. If any issue or claim or relief was reserved to be litigated later, it must be clearly shown in the order such as the parties be given liberty to do so. We could not find any reservation or liberty in respect of those claims against the appellant being given in that consent order. For that reason, we are of the view that res judicata and estoppel applies to the present suit. We respectfully disagree with the view taken by the learned judge when he stated:

... However, to my mind, the issue of damages had not been left out in the other suit on purpose or through negligence as the other suit was only to determine the beneficial ownership of the shares. After that was settled, it was up to the plaintiff whether or not to claim for damages if necessary. The fact that this action was not included in the consent order of the other suit, when both parties knew that it was pending, shows that the parties were aware then that this matter was still being proceeded with. By not insisting that this action be included in the compromise in the other suit is a strong indication that the first defendant held the view that the matters could be dealt with separately. The issue of *res judicata*, therefore, cannot apply.

The appellant's counsel submitted that the fact that the appellant did not take objection to the present suit be continued or failed to insist that the present suit be withdrawn in the consent order was irrelevant. The learned counsel submitted further that public policy prevents the continuance of the present suit and that is sufficient ground to strike out the present suit. He went on to say that the consent order in the first suit was a compromise and any matter left out in that consent order cannot be relitigated and negotiated because of the doctrine of res judicata and he referred to the *The Law and Practice of Compromise* by David Foskett (4th edn) as to the effects of a compromise at pp. 93 and 94:

> Matters left out
>
> Not infrequently the analysis of the appropriate materials will disclose that the parties expressly or by necessary implication compromised certain matters of dispute but not others. In some cases it will be clear that certain matters were expressly or by implication not made part of the compromise. However, there may be cases where, on any objective view, the parties could and should have dealt with a particular matter but neglected to do so. To what extent will they be permitted by the court to litigate that matter on some future occasion?
>
> It is submitted that there is, in principle, a distinction between compromises effected merely by agreement and those effected by a judgment or order. In the former case, unless the court can imply a term to the effect that the matter was compromised, the agreement as construed must stand: the court will not rewrite the parties' bargain. It may be quite possible for the agreement to be effective without the matter in question having been made specifically part of it.
>
> In the latter case, where the compromise is embodied in a judgment or order, an extension of the doctrine of *res judicata* may operate to prevent the matter being litigated. In *Henderson v. Henderson* it was said:
>
> > ... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.

In *Greenhalgh v. Mallard*, it was said:

> … res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

Thus, where parties have compromised their litigation and have finalized the matter by a consent judgment or order, it would appear to be open to a party to plead *res judicata* in this wider sense if the other sought to raise afresh a matter which "probably belonged" to that litigation but which, through negligence, inadvertence or accident, had not been raised and thus compromised expressly.

The learned counsel also referred to the judgment of Peh Swee Chin, FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd (supra)* at pp. 794-795:

> A word of caution is required about the words 'exercising reasonable diligence' in the said famous passage [in *Henderson v. Henderson* (1843) 3 Hare 100]. The words do not, in our view, necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial, the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the earlier action and which were not.
>
> The words ought to be understood as a gentle rebuke for the failure aforesaid, ie despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and the words are not meant to impose a pre-condition for applying the doctrine of res judicata but are meant to say that the said non-bringing of the issues would count in any event irrespective of whether the said failure was or was not deliberate or due to inadvertence or negligence. Otherwise, the words would have virtually all but destroyed the efficacy of estoppel *per rem juticatum.*
>
> Another source of small confusion is the rule that generally an estoppel, of which an estoppel per rem judicatum is a kind, as the name implies, has to be pleaded. But in Superintendent of *Pudu Prison v. Sim Kie Chong* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ held to the effect that the court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicate* against a party even it has not been pleaded. We venture to think the reason for the ratio is that an estoppel or exclusion of evidence based on a question of public policy, ie in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded.

The learned counsel for the respondent contended that they did not claim for wrongful detention against the appellant in the first suit, and the claim for wrongful detention is found only in the present suit. With the greatest respect to the learned counsel, paras. 10-15 of the respondent's claim in the first suit was in fact a claim for wrongful detention. Even assuming that the learned counsel was right that there was no such claim in the first suit, the fault was with the respondent if it did not make such claim in the first suit. It is not disputed that the facts leading to those shares being in the hands of the appellant and the refusal to return those shares are the same in the first suit and in the present suit. If the respondent failed to claim for wrongful detention in the first suit, then the respondent was at fault. The facts in the present suit are exactly the same as in the first suit and we could not see any reason why the respondent did not claim for wrongful detention and why it is necessary for the respondent to file another suit to claim for wrongful detention. Reservation of the issue would not help the respondent. In our view, the failure on the part of the respondent to claim for wrongful detention in the first suit (if that was so) would be fatal to the respondent because the doctrine of *res judicata* or issue of estoppel would still apply to the present suit. We are of the view that in filing the first suit and the present suit, the respondent was attempting to make two separate claims arising from the same cause of action and in respect of the same breach, and this is clearly an abuse of the process of the court.

Even assuming that there was a reservation, what is the effect of the reservation? This issue was answered by *SCF Finance Co Ltd v. Masri & Anor (No. 3)* [1987] 1 All ER 194 where the Court of Appeal in England held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but elected not to proceed on that issue in the previous proceeding. It was held she was not entitled to assert the issue afresh in subsequent proceedings, even if that issue was not heard and determined or it was "reserved". In our view, the reservation as found by the learned judge would not help the respondent in their case. As pointed out, the issues raised in the statement of claim in the present suit are exactly the same issues being raised against the appellant in the first suit. The respondent attempted to distinguish the two suits by stating that the claim in the first suit was for wrongful conversion while in the present suit it is for wrongful detention. As we have stated earlier, we find that in both suits the main claim of the respondent is for wrongful detention. Even if it is true as what the respondent has stated, we agree with the appellant's counsel that taking into consideration the facts in both claims, the claim for wrongful conversion in

the first suit and wrongful detention in the present suit are claims of the same nature because wrongful conversion involves the element of wrongful detention. Following the decision of *SCF Finance Co v. Masri & Anor Ltd (No. 3)*, it is clear to us that the appellant has every right to raise the issue of *res judicata* to strike out the writ and the statement of claim in respect of the present suit.

The appellant have applied to strike out the respondent's statement of claim in the present suit. Apparently, the learned judge heard this application together with the application by the respondent to amend their statement of claim. It was the contention of the learned counsel for the appellant that if the appellant's application to strike out the writ and the statement of claim is successful then the application to amend the statement of claim would be of no use because there is no more statement of claim to be amended. In our view, when the learned judge allowed the application by the respondent to amend the statement of claim in the present suit it means that he had dismissed the application by the appellant to strike out the writ and statement of claim even though it was not so stated in the judgment.

After hearing the parties, we are of the view that the appellant have succeeded in establishing that *res judicata* and estoppel apply to the present suit. We hold that the writ and statement of claim should be struck off on the ground of *res judicata* and estoppel. For that reason, the application by the respondent to amend the statement of claim is therefore dismissed.

The appeal by the appellant is hereby allowed with costs here and below. The order of the learned judge is hereby set aside. The deposit is to be refunded.

My learned brother, Faiza Thamby Chik J, has seen this judgment in the draft and expressed his agreement with the judgment and the decision. My learned brother, KC Vohrah, JCA, has since retired and could not express his views. For that reason, the decision would be a majority judgment and not a unanimous decision of the court.